BLANK

PAGE

BLANK

PAGE

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statement | 2 |
| Argument | 11 |
| Conclusion | 17 |


## CITATIONS

Cases:


| | |
|---|---|
| *Allen* v. *United States*, 164 U.S. 492 | 2, 14, 15 |
| *Andrews* v. *United States*, 309 F.2d 127, certiorari denied, 372 U.S. 946 | 15 |
| *Blockburger* v. *United States*, 284 U.S. 299 | 16 |
| *Blumenthal* v. *United States*, 332 U.S. 539 | 13 |
| *Cataneo* v. *United States*, 167 F.2d 820 | 12 |
| *Commonwealth* v. *Tuey*, 8 Cush. (62 Mass.) 1 | 15 |
| *Estes* v. *United States*, 335 F.2d 609, certiorari denied, 379 U.S. 964 | 15, 16 |
| *Gore* v. *United States*, 357 U.S. 386 | 16 |
| *Ingram* v. *United States*, 272 F.2d 567 | 12 |
| *Kawakita* v. *United States*, 343 U.S. 717, affirming 190 F.2d 506 | 14, 15, 16 |
| *Kivette* v. *United States*, 230 F.2d 749, certiorari denied, 355 U.S. 935 | 12, 14 |
| *Lawn* v. *United States*, 355 U.S. 339 | 4 |
| *Lias* v. *United States*, 284 U.S. 584, affirming 51 F.2d 215 | 14, 15 |
| *Logsdon* v. *United States*, 253 F.2d 12 | 16 |

| Cases—Continued | Page |
|---|---|
| *Scheve* v. *United States*, 184 F.2d 695 | 12, 14 |
| *Thaggard* v. *United States*, 354 F.2d 735, certiorari denied, 383 U.S. 958 | 15 |
| *United States* v. *Gainey*, 380 U.S. 63 | 4 |
| *United States* v. *Kahaner*, 317 F.2d 459, certiorari denied, 375 U.S. 836 | 15 |
| *United States* v. *Kenner*, 354 F.2d 780, certiorari denied, 383 U.S. 958 | 15 |
| *United States* v. *Pruitt*, 341 F.2d 700 | 16 |
| *United States* v. *Romano*, 382 U.S. 136 | 4 |
| *United States* v. *Sorcey*, 151 F.2d 899, certiorari denied, 327 U.S. 794 | 16 |
| *Walker* v. *United States*, 342 F.2d 22, certiorari denied, 382 U.S. 859 | 15 |
| *Wiley* v. *United States*, 277 F.2d 820, certiorari denied, 364 U.S. 817 | 14 |
| *Wolin* v. *United States*, 211 F.2d 770, certiorari denied, 348 U.S. 819 | 16 |
| Statutes and Rule: | |
| 18 U.S.C. 287 | 4 |
| 18 U.S.C. 371 | 3 |
| 18 U.S.C. 641 | 2, 4 |
| 18 U.S.C. 1001 | 3, 4 |
| 18 U.S.C. 4202 | 4 |
| 18 U.S.C. 4208(a)(2) | 4, 16 |
| Federal Rules of Criminal Procedure, Rule 8(b) | 11, 12 |

# In the Supreme Court of the United States

OCTOBER TERM, 1966

---

No. 369

WILLIAM HERMANN GODEL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (3 R. 21-28; Pet. App. B, pp. 13-20) is reported at 361 F. 2d 21.[1]

---

[1] "1 R." and "2 R." refer to the printed record, in two volumes (consisting, respectively, of the appendices to petitioner's and the government's briefs in the court of appeals), "3 R." to the volume containing the proceedings in the court of appeals, "Tr." to the original transcript, in sixteen volumes, and "G. Ex." to government exhibits.

## JURISDICTION

The judgment of the court of appeals was entered on May 20, 1966 (3 R. 30). On June 17, 1966, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 19, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether counts involving a codefendant of petitioner were prejudicially misjoined in the indictment.

2. Whether this Court should reconsider the propriety of the supplementary instruction approved in *Allen* v. *United States*, 164 U.S. 492.

3. Whether petitioner's sentence, which was within the statutory maximum, was subject to appellate revision.

## STATEMENT

Count 1 (1 R. 1-6) of a 43-count indictment (1 R. 1-12; 2 R. 1-3; 1 Tr. 1-27), filed in the United States District Court for the Eastern District of Virginia, charged that petitioner and a codefendant, John Wylie, conspired from about May 29, 1961, to November 6, 1963, to violate 18 U.S.C. 641 (embezzlement of money or property of the United States), 287 (filing false claims against the United States), and 1001 (making false statements in any matter within the jurisdiction of any department or agency of the

United States),[2] and to defraud the United States of money and property, in violation of 18 U.S.C. 371. It was alleged that, as part of the conspiracy, Wylie, the Director of Budget and Finance in the Office of the Secretary of Defense, would appoint certain officers of the United States armed forces as "Class A Agents," thereby authorizing such officers to draw government funds for use in confidential enterprises of the United States; that Wylie and petitioner, the Deputy Director of the Advanced Research Projects Agency ("ARPA") (another unit in the Office of the Secretary of Defense), would thereafter obtain portions of these funds, issue receipts to the Class A Agents falsely stating that the moneys so obtained were to be used for official expenses, and convert such funds to their own use; and that the defendants would later cause the Class A Agents to be reimbursed out of government funds by submitting false vouchers and documents on the basis of which Treasury reimbursement checks would be issued (1 R. 1-3). Thirty-one overt acts were alleged (1 R. 3-6). Count 5 (1 R. 8) charged petitioner alone with having made a false and fraudulent statement within the jurisdiction of the Department of Defense, to wit, a statement submitted July 21, 1961, to the effect that $10,000 had been obligated for certain confidential projects of the United States in Vietnam, in violation of 18 U.S.C. 1001. Following a jury trial (jointly with Wylie), petitioner was convicted on both counts and was sentenced to five years' imprisonment on each, the terms

[2] The statutes referred to are set forth in full at Pet. App. A, pp. 11-12.

to run concurrently (1 R. 22-23). Petitioner's sentence specified that the provisions of 18 U.S.C. 4208 (a)(2) were to be applicable (1 R. 23).[3] On petitioner's appeal, the court of appeals unanimously affirmed (3 R. 21-28, 30; Pet. App. B, pp. 13-20).[4]

In view of the court of appeals' finding (3 R. 23; Pet. App. B, p. 15) that the record "is replete with" evidence of petitioner's guilt on the conspiracy count (the conviction on which, alone, suffices to support his concurrent sentences)[5] and petitioner's failure to challenge that determination in this Court, there

---

[3] A person so sentenced is eligible for parole immediately upon commitment; in the absence of such a proviso he must serve at least one-third of his sentence before he can be considered for parole (18 U.S.C. 4202).

[4] Wylie was convicted on the conspiracy count and, in addition, on four counts in which petitioner was not charged. Of the 41 counts other than the two on which petitioner was convicted, six (Nos. 36-41, inclusive) did not involve either petitioner or Wylie; they charged substantive offenses against one James Loftis, as to whom a severance was granted before trial (1 Tr. 24-26, 277). Of the other 35 counts, each of which charged either petitioner or Wylie, alone, with a substantive violation of one or another of the three statutes—18 U.S.C. 641, 287 and 1001—referred to in the text, the government elected before trial not to proceed as to twenty (Nos. 15-17, 19-33, 35 and 43) (1 Tr. 277). Of the remaining fifteen counts—five involving petitioner (Nos. 2, 4, 7, 8, and 14) and ten Wylie (Nos. 3, 6, 9-13, 18, 34, and 42)— eight (Nos. 2, 3, 8-11, 13, and 14) were dismissed during the trial (1 Tr. 279), Wylie was convicted on four (Nos. 12, 18, 34, and 42), petitioner was acquitted on two (Nos. 4 and 7), and Wylie was acquitted on one (No. 6) (1 R. 22; 1 Tr. 280).

[5] See, *e.g.*, *United States* v. *Romano*, 382 U.S. 136, 138; *United States* v. *Gainey*, 380 U.S. 63, 65; *Lawn* v. *United States*, 355 U.S. 339, 359.

is no occasion to delineate in detail the government's supporting proof adduced at the trial. We set forth in the following summary only enough of the evidence to show the general character of the conspiracy involved and to give an indication of its scope and dimensions. We include in our review that portion of the proof of the conspiracy which was also germane to the substantive count on which petitioner was convicted.

1. A "Class A Agent" was a military officer who was designated by a Defense Department official having the authority to do so to make expenditures of government moneys, drawn in advance from a special account, for special purposes not falling within the regular or routine jurisdiction of the Office of Finance and Accounts (1 R. 24-25, 55-56). The agent was responsible for the safekeeping of the funds; was expected to replenish them from time to time, as they were spent, with Treasury checks issued in payment of vouchers submitted in authentication of past expenditures; and was required to return the funds, or otherwise account for them, upon the completion of his mission (1 R. 25, 36). Wylie, during the relevant period, had and regularly exercised the authority to designate officers as Class A Agents (1 R. 25).

During the years 1960-1961, Colonel Thomas Brundage, a Marine Corps officer, was assigned to ARPA, where petitioner was one of his civilian superiors (1 R. 26, 42). In April 1960, Brundage was appointed a Class A Agent by Wylie and in the following month, in his capacity as such, he drew $4,000 in cash from the Army Finance Office (1 R. 26-27; G.

Exs. 1 and 2, 6 Tr. 12). Brundage, at Wylie's direction, gave portions of this money to both Wylie and petitioner, receiving from them, in exchange, chits, or receipts, acknowledging receipt of the funds advanced (1 R. 27, 59-61). On one occasion, in April 1961, immediately prior to an audit which was made of Brundage's Class A account, both petitioner and Wylie, following discussions with Brundage of the audit which was about to take place, supplied Brundage with cash in the amounts of their receipts, which they then took back. Following the audit, both officials again drew cash from Brundage, in exchange for new receipts (1 R. 27-28).[6]

From June 4 to June 30, 1961, petitioner was absent from Washington on an official trip to South Vietnam (1 R. 66). Prior to petitioner's departure, Wylie increased Colonel Brundage's Class A drawing account by $10,000, explaining to Brundage that the purpose of the increase was to enable Brundage to supply petitioner with funds he would need on his trip (1 R. 28-29; G. Ex. 3, 6 Tr. 12). Petitioner also discussed the matter with Brundage, explaining that he needed $10,000 with which to establish a Combat Development Test Center in Vietnam (1 R. 29, 35). On June 2, accordingly, Brundage drew an additional $10,000 from his Class A account—the funds consisting of $2,000 in cash and two Treasury checks,

---

[6] Neither the Director of ARPA (petitioner's immediate superior) nor the Director's immediate superior had, during the pertinent period, ever heard of Class A Agents or the availability of Class A funds to finance ARPA activities (1 R. 69, 83; 7 Tr. 238-240).

payable to himself, in the amounts of $5,000 and $3,000 (1 R. 29-30; G. Exs. 4-6, 6 Tr. 12, 29). At petitioner's direction, Brundage exchanged the two Treasury checks for cashier's checks, payable to petitioner, in the same amounts as the Treasury checks (1 R. 30; 6 Tr. 58-60; G. Exs. 7 and 8, 6 Tr. 57), delivered the cashier's checks and the $2,000 in cash to petitioner, and took petitioner's receipt in exchange (1 R. 30-31).

Through documentary and testimonial evidence it was established at the trial that neither of the two aforementioned cashier's checks was cashed or used by petitioner on his trip to Vietnam. The $5,000 check was converted by petitioner, following his return, to his own personal use.[7] The $3,000 check was converted by petitioner to Wylie's personal use.[8] And

---

[7] Petitioner cashed this check at an Arlington, Virginia, bank on February 13, 1962—seven months following his return from Vietnam (2 R. 4). That bank, on the same day, issued to petitioner, in exchange, $2,500 worth of traveler's checks and a $2,500 cashier's check payable to his order (2 R. 4-5; G. Exs. 10 and 11, 7 Tr. 163-164). Eight months later, on October 22, the check last mentioned was deposited in petitioner's and his wife's personal checking account (2 R. 7; G. Ex. 14, 2 R. 8; G. Ex. 17, 7 Tr. 183). A dredging job at petitioner's Lake Barcroft residence was paid for with a check for $1,011.33, drawn by petitioner's wife on the balance in this account during the period immediately ensuing (2 R. 8, 10; G. Ex. 15, 2 R. 8; G. Ex. 18, 7 Tr. 191).

[8] This check, bearing petitioner's and Wylie's endorsements, was cashed by Wylie at the Pentagon Credit Union on June 30, 1961—the day of petitioner's return from his trip (2 R. 11-12). On the same day a cash deposit of $2,000 was made in Wylie's and his wife's personal checking account (7 Tr. 289, 292; G. Exs. 16 and 136, 7 Tr. 296).

there was evidence from which the jury could conclude that at least $1,500 of the $2,000 in cash which petitioner received from Brundage was similarly misappropriated and embezzled.[9]

On July 21, 1961, three weeks following his return from Vietnam, petitioner submitted to Wylie a memorandum—the document on which count 5 was based—stating that he had, while in that country, "obligated funds" in the amount of $10,000 for confidential govermental projects (1 R. 131; 2 R. 13; 7 Tr. 243; G. Ex. 23, 6 Tr. 29). Wylie, on August 10, 1961, submitted a voucher to the Defense Department, based on this memorandum, requesting the payment of $10,000 to petitioner in reimbursement for official expenses (2 R. 13; G. Ex. 22, 6 Tr. 29). A notation attached to the voucher stated that the supporting documents were on file in the Budget and Finance Division of the Office of the Secretary of Defense (2 R. 13-14, 15; G. Ex. 22, 6 Tr. 29). Extensive evidence was introduced by the government indicating that there never had been any such documents (other than petitioner's bare memorandum itself) (1 R. 131-132; 2 R. 12-15). Based on Wylie's voucher, a $10,000 Treasury check was issued to petitioner, who, with it, repaid Brundage for the Class A funds in that amount advanced him prior to his trip (1 R. 31; 7 Tr. 165; G. Ex. 21, 6 Tr. 29).

---

[9] On June 6, 1961—four days after receiving this cash from Brundage—petitioner, while en route to Vietnam, bought fifteen $100 traveler's checks in Honolulu, Hawaii (2 R. 6; G. Ex. 9, 7 Tr. 177). On July 7, a week following his return from his trip, six of these checks were cashed in Washington by petitioner's wife (2 R. 6).

2. In March 1963 petitioner told Major William Corson—Colonel Brundage's successor in ARPA and also a Wylie-appointed Class A Agent (1 R. 37, 84-85)—that Wylie and his "boss" needed $3,000 in connection with a trip they were taking to "the hill"; that he (petitioner) was contributing $1,800 of this amount; and that Corson should "make up the rest" (1 R. 94-95). On March 26, accordingly, Corson supplemented the money which petitioner was putting up with $1,200 of his own Class A funds and delivered the entire $3,000, in cash, to Wylie's secretary, Helene Harper (1 R. 95; 2 R. 18-19, 20). On the same day, and at about the same time, Miss Harper also called at the office of Colonel John Dean—a third Class A Agent whom Wylie had appointed—and there picked up another large sum of money, which Wylie had asked Dean to advance him from Dean's Class A funds (2 R. 16-18). At Wylie's request, Miss Harper deposited the money so collected—a total of $6,000—in a checking account of Wylie's at a Fairfax County bank (2 R. 18-20; G. Ex. 135, 8 Tr. 567). Four days later, on March 30, a check in the amount of $8,000, which Wylie had drawn against his account in this bank in part payment for a pleasure boat which he purchased on March 22, was duly presented for payment and honored (2 R. 20-22; G. Ex. 19, 8 Tr. 568; G. Ex. 76, 8 Tr. 576).

3. On October 31, 1963, Wylie was officially questioned concerning Class A moneys which two other Wylie-appointed Class A Agents had reported having advanced to him, and he was asked to give an accounting. Following considerable delay, during which

he was observed to become visibly upset, Wylie produced an envelope containing $5,600 in currency and a check in the amount of $4,000, stating that this was the money for which he was accountable (2 R. 29-35). The check, payable to Wylie and his wife, Harriet, had been endorsed by both spouses (2 R. 31-32, 34-35). The interrogating officer questioned the propriety of Wylie's use of this "personal money" with which to account for Class A funds supposedly in his custody, and turned the matter over to Wylie's superior and the Department general counsel for further investigation as to possible financial irregularity (2 R. 35).

On the following morning, November 1, petitioner and Major Corson met with Wylie, at Wylie's request, at a motor hotel near the Pentagon (1 R. 105-107). Speaking "almost incoherent[ly]," Wylie told petitioner and Corson about the events of the previous day and the fact that he had been given "a hard time" about his "using Hariett's [*sic*] check" with which to account (1 R. 108, 109). On their way back to the Pentagon following this meeting, petitioner asked Corson what the current status of his own indebtedness to Corson's Class A account was. After checking his records, Corson told petitioner that he owed $3,031 (1 R. 109). Petitioner gave Corson a receipt in that amount, in consolidation of a number of old receipts which Corson had been holding (1 R. 109-110; G. Ex. 49, 7 Tr. 376-377).

On November 4, a cash count of Corson's Class A funds by a member of the staff of the Army Inspector General resulted in the discovery of petitioner's

$3,031 receipt (1 R. 111; 2 R. 35). Later that day all Class A Agents were officially directed to close out their accounts by the following morning (1 R. 111; 9 Tr. 775). On the following morning, at about 11 o'clock, Corson told petitioner that he had to have the $3,031 for which he was holding petitioner's receipt by 2:30 p.m. (1 R. 112). To raise part of this money, petitioner sold his personal automobile to an ARPA consultant named Phelps, for $2,195, on his lunch hour that day (1 R. 112-114; 2 R. 5, 8-9, 23-28; G. Ex. 56, 9 Tr. 716; G. Ex. 58, 7 Tr. 166; G. Exs. 59 and 110, 7 Tr. 189-190).

## ARGUMENT

I. There is no merit to petitioner's contention that the substantive counts (or some of them) in which Wylie alone was charged with offenses (see note 4, *supra*, p. 4) were misjoined with the counts in which petitioner alone was charged (Pet. 3-5). Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

The instant indictment fully complied with this Rule. Since count 1 charged petitioner and Wylie with joint participation in a conspiracy to commit offenses against and to defraud the United States, it is clear

that the defendants were properly tried together at least as to that count, and petitioner does not contend otherwise. With respect to the substantive counts, the contention is that some of the counts, ten in number, in which Wylie alone was charged and as to which he went to trial (see note 4, *supra*) were improperly joined with, and prejudicially tried at the same time as, the substantive counts involving petitioner alone.

To the extent that petitioner's contention relies on the fact that the indictment did not *in terms* allege that the offenses charged in the substantive counts were all part of the "same series of acts or transactions constituting an offense or offenses" (Rule 8(b), *supra*) (Pet. 3), or that they "were related to the conspiracy" (Pet. 4, 5), it is clearly insubstantial. There is no necessity for such an allegation for joinder to be proper. The relevant question is whether it appears that the offenses were *in fact* part of the "same series of acts or transactions * * *." *Ingram* v. *United States*, 272 F.2d 567 (C.A. 4); *Cataneo* v. *United States*, 167 F.2d 820 (C.A. 4); *Kivette* v. *United States*, 230 F.2d 749 (C.A. 5), certiorari denied, 355 U.S. 935; *Scheve* v. *United States*, 184 F.2d 695 (C.A.D.C.).

That some of the offenses charged in the ten counts in question were part of the "same series of acts or transactions * * *," within the contemplation of the Rule, is apparent even from the brief summary of the evidence contained in the Statement, *supra*.[10] To

[10] Count 3, for example, charged that Wylie embezzled $3,000 on June 30, 1961 (1 R. 7). This related to the $3,000

show that all were part of the series would necessitate a detailed exposition of all the facets of the conspiracy, which extended over a period of two and a half years. That petitioner may not have known of all of the advances of funds made to Wylie by the various Class A Agents with whom that accused dealt, or even the identities of all of the Agents (Pet. 4), did not prevent those dealings of Wylie from being part of the "same series of acts or transactions" of which the events directly participated in by petitioner were components. Analogously, a conspirator's lack of knowledge of all the details of the conspiracy, or the identities of all of its members, does not prevent his punishment for his part in the criminal venture. Cf. *Blumenthal* v. *United States*, 332 U.S. 539, 556-558. It was

---

cashier's check which petitioner received from Class A Agent Brundage just prior to his departure for Vietnam and which he converted to Wylie's personal use on the day of his return from his trip (pp. 6-7, *supra*). The transaction was the subject of one of the overt acts (No. 3) charged in the conspiracy count (1 R. 3).

Count 6 charged that Wylie made a $10,000 false claim against the United States on August 10, 1961 (1 R. 8-9). This related to the voucher in that amount which Wylie filed on that date, on the basis of which petitioner received the $10,000 Treasury check which he used to reimburse Brundage for the latter's advance to him of Class A funds just prior to his trip (pp. 6-8, *supra*). This transaction was also the subject of one of the overt acts (No. 6) alleged in the conspiracy count (1 R. 4).

Count 42 charged that Wylie embezzled $6,000 on March 26, 1963 (1 R. 11-12). This related to the fund in that amount to which petitioner and Class A Agent Corson had jointly contributed (the latter out of Class A funds) and which Wylie applied toward the purchase of a pleasure boat (p. 9, *supra*).

not necessary, in short, for the government to prove that each defendant directly participated in each of the incidents making up the series. Rule 8(b) is explicit that "all of the defendants need not be charged in each count." Petitioner's theory, under which each defendant, for joinder to be proper, must appear to have had a role in each link of the series, would in effect read this clause out of the Rule. Cf. *Wiley* v. *United States*, 277 F. 2d 820, 824 (C.A. 4), certiorari denied, 364 U. S. 817; *Kivette* v. *United States*, 230 F. 2d 749, 753 (C.A. 5), certiorari denied, 355 U. S. 935; *Scheve* v. *United States*, 184 F. 2d 695, 697 (C.A.D.C.).

2. There is no occasion for the Court to "reconsider the wisdom of" the so-called *Allen* charge (Pet. 5-8) —which was here given to the jury on the afternoon of the third day of its deliberations, after it had reported that it was deadlocked on four counts (1 R. 21, 233-234, 243-245).[11] First sanctioned by this Court in *Allen* v. *United States*, 164 U.S. 492, 501-502, the charge has been specifically re-approved on at least two occasions, most recently in 1952. *Lias* v. *United States*, 284 U.S. 584 (1931), affirming 51 F.2d 215, 218 (C.A. 4); *Kawakita* v. *United States*, 343 U.S. 717, 744 (1952), affirming 190 F.2d 506, 521-528

---

[11] Petitioner states that the charge was given "immediately after the reading back to the jury of some especially damaging testimony, part of which was omitted by the reporter" (Pet. 7). The record indicates, however, that the jury specifically requested that the testimony in question be read (1 R. 22, 234), and no objection was made at the trial to the omission of any portion thereof (1 R. 235-240).

(C.A. 9).[12] It has, in addition, been generally and repeatedly approved by the courts of appeals. See, *e.g.*, among the more recent decisions, *United States* v. *Kenner*, 354 F.2d 780, 782-784 (C.A. 2), certiorari denied, 383 U.S. 958; *Thaggard* v. *United States*, 354 F.2d 735, 738-739 (C.A. 5), certiorari denied, 383 U.S. 958; *Walker* v. *United States*, 342 F.2d 22, 25-26 (C.A. 5), certiorari denied, 382 U.S. 859; *Estes* v. *United States*, 335 F.2d 609, 618-619 (C.A. 5), certiorari denied, 379 U.S. 964; *United States* v. *Kahaner*, 317 F.2d 459, 483-485 (C.A. 2), certiorari denied, 375 U.S. 836; *Andrews* v. *United States*, 309 F.2d 127, 129 (C.A. 5), certiorari denied, 372 U.S. 946.

Nor were any erroneous or prejudicial deviations made from the text of the charge as approved in the *Allen* case, 164 U.S. at 501-502 [13] (Pet. 7). The charge

---

[12] In *Lias*, the court of appeals had upheld a supplemental charge "substantially" similar to the *Allen* charge (51 F.2d at 218). This Court, on writ of certiorari "limited to the question raised by the supplemental charge to the jury" (284 U.S. 604), affirmed the lower court's judgment *per curiam*, simply citing the *Allen* decision (284 U.S. 584).

In *Kawakita*, the lower court had similarly upheld a supplemental charge substantially like the *Allen* instruction (190 F.2d at 521-528). The use of the instruction was one of the alleged errors relied on in this Court for reversal (Brief for Petitioner, No. 570, Oct. Term, 1951, pp. 160-169). This Court disposed of the contention by grouping it with others and saying that all were "either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice" (343 U.S. at 744).

[13] See *Commonwealth* v. *Tuey*, 8 Cush. (62 Mass.) 1, 2-3, where the text of the *Allen* charge, as originally given, appears. The text is reproduced at Pet. 6, n. 1.

here given (1 R. 243-245) is substantially the same as the charge approved in the *Kawakita* case, 343 U.S. at 744 (see note 12, *supra*), including those aspects which petitioner particularly criticizes (Pet. 7) —the statements that the case was an "important" one and that the trial had been "expensive in time and effort and money" (1 R. 243). See 190 F.2d at 524. See, also, *Estes* v. *United States*, 335 F.2d 609, 618-619, incl. n. 25 (C.A. 5), certiorari denied, 379 U.S. 964; *Logsdon* v. *United States*, 253 F.2d 12, 16 (C.A. 6); *Wolin* v. *United States*, 211 F.2d 770, 772 (C.A. 4), certiorari denied, 348 U.S. 819; *United States* v. *Sorcey*, 151 F.2d 899, 901-902 (C.A. 7), certiorari denied, 327 U.S. 794.

3. There is, finally, no occasion for the Court in this case to reconsider the well settled principle that, at least in the absence of the most exceptional circumstances, a sentence which is within the maximum imposable under the applicable statute or statutes is not subject to appellate review or revision (Pet. 8-9). Cf. *Gore* v. *United States*, 357 U.S. 386, 393; *Blockburger* v. *United States*, 284 U.S. 299, 305; *United States* v. *Pruitt*, 341 F.2d 700, 703-705 (C.A. 4). Petitioner's sentence—five years on each of the two counts on which he was convicted, to run concurrently—was substantially lighter than could have been imposed. Not only might the prison terms have been made cumulative but fines of up to $10,000 on each count could have been imposed as well (Pet. App. A, pp. 11, 12). The court, indeed, exercised particular leniency in invoking its power under 18 U.S.C. 4208(a)(2)

to make petitioner eligible for parole from the moment of his incarceration—without which proviso he would not be eligible for parole until after he had served a third of his sentence (see n. 3, *supra*). In imposing sentence, Judge Lewis indicated that he was taking into consideration both the "high and responsible" position in the government which petitioner had held and the "ample evidence" of his guilt (1 R. 247). Under all the circumstances, the sentence was not unduly severe.

## CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
*Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

PHILIP R. MONAHAN,
*Attorney.*

AUGUST 1966.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 220390 122